IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(MWANZA SUB-REGISTRY)

AT MWANZA

MISC. LABOUR APPLICATION NO. 51 OF 2021

(Originating from Labour Dispute No. CMA/MZ/MAG/348/2019/99/2020)

JOANITHA JOHN.....APPLICANT

VERSUS

CMG. INVESTIMENT LTD.....RESPONDENT

RULING

24th March & 19th May, 2022

DYANSOBERA, J.:

The applicant herein is seeking extension of time within which to lodge an application for review of the decision of this Court (Hon. Gerson Mdemu, J.) in Revision Application No. 60 of 2018 delivered on 5th November, 2018.

The time line of events is, briefly, the following. The applicant is an ex-employee of the respondent whose contract of employment was terminated on 30th day of May, 2015. She unsuccessfully referred her labour dispute to the Commission for Mediation and Arbitration. Still aggrieved, the applicant filed before this court Revision Application No. 60 of 2015. This court found the termination to have been substantively and procedurally unfair and allowed the application ordering each party to bear own costs.

Following that decision, the applicant embarked on having the Award in her favour executed. The execution process, however, encountered a drawback. The court officer charged with the execution, the Deputy Registrar, found the Award incapable of being executed on account that the Commission for Mediation and Arbitration had not given any order in favour of the applicant and the High Court did not give any order capable of being executed. Further that, the High Court simply allowed the appeal without specifying which should be executed.

According to her sworn affidavit in support of the application, the applicant advanced the following grounds:-

4. That, after being terminated I challenged unsuccessfully the decision of the Commission for Mediation and Arbitration at Mwanza but later on the decision was quashed in the High Court of Mwanza at Mwanza through a decision in revision number 60 of 2016 delivered on 5th November, 2018 before Honorable Judge Gerson Mdemu. A copy of the said decision is attached hereto marked as Annexture J1 and a leave of this Honorable Court is craved for to form part of this affidavit.
5. That, following the above High Court decision, I lodged execution application so as to enjoy the fruits of the decision in execution No. 28 of 2019 but the same after being adjourned for several times

through various Deputy Registrars it was later struck out on 2nd December, 2021 before Hon. C.M. Tengwa Deputy Registrar. A copy of the said order to struck out the application is annexed hereto marked as Annexture J2 and a leave of this Honourable Court is craved for to form part of this affidavit.

6. That, in the said order, the honourable Deputy Registrar while striking out the application stated that the High Court allowed the application without specifying what can be executed.
7. That, upon learning this I was advised by my current advocate Egbert Mjungu that in the present situation contrary to the law the decision in Revision No. 60/2016 above contains an apparent error on the face of records in that the same does not state what the applicant should be given as an employee after the decision to terminate her was set aside and the same can be cured through review application.
8. That, the said review application as per the law is out of time as it is beyond fifteen days from the decision intended to be reviewed.
9. That, the failure to lodge the application for review in time was out of human control as I believed indeed that the decision could be executed without any problem and the same has been discovered by the court itself.

10. That, under the law the court was obliged to state categorically what I am entitled after nullifying the decision for termination of my employment.
11. That, the intended review application is meritious as the impugned decision the subject of review contains a serious apparent error and its is only review application which can cure the said errors.
12. That, it is for interest of justice that this application be granted as I have been foiling in court since 2015 searching for my rights after being unlawfully terminated by the respondent herein.

Expounding on these grounds, Mr. Egbert Mujungu, learned Advocate for the applicant made the following submission. After the court found that the Award was incapable of being executed, the applicant believed that a review was a proper remedy to rectify the anomaly. Unfortunately, time had elapsed and this formed the basis of her filing this application so that the errors could be rectified, otherwise the applicant would be carrying an empty Award.

Counsel for the applicant went on submitting that in an application like the present one, the applicant has to adduce sufficient reasons. He cited the case of **Hamis Babu Bally v. the Judicial Officers Ethics Committee and 3 Others,** Civil Application No. 130/10 of 2020 to support his argument.

In the case under consideration, Mr. Mujungu contended, the applicant has been all the time in court seeking to execute her Award which though was given by this court, it later turned out during its execution, that it was incapable of being executed (*haitekelezeki).* The applicant did not sleep on her right and since this is a court of justice and had declared the applicant a winner, it behoves it to make sure that its order is effected so as to put the matter and the record right inasmuch as the court did not specify the rights of the applicant, Counsel insisted.

Submitting in opposition, Mr. Andrew Innocent John Luhigo, learned Counsel for the respondent, adopting his counter affidavit, submitted to the following effect.

With regard to the case relied on by Counsel for the applicant, he said that there should not be a prolonged delay. He explained that the decision the applicant seeks to impugn was delivered on 5.1.2018 and now more than three years have passed which means that it is a prolonged (inordinate) delay which factor disqualifies the applicant from getting the relief she is seeking. On the allegations of technical delay visa vis actual delay, Counsel for the respondent made reference to the case of **Fortunatus Masha V. William Shija & Another** [1997] TLR 154 on what amounts to technical delay. He was of the view that for the technical delay to assist the applicant to get extension, the matter which was being

pursued in court must be the one for which time is sought to be extended. It was argued on part of the respondent that the applicant was not pursuing the matter which is sought to be challenged, rather she was pursuing execution hence there was no technical delay, Mr. Luhigo stressed. It was further argued on part of the respondent that the applicant has failed not only to account for the period of more than 3 years but has also failed to account for each day of delay as the law requires and as decided in the case of **Fortunatus Masha** (supra)

On the point of illegality that the decision did not specify what the applicant deserves, counsel for the respondent argued that this is not a point illegality. According to him, the point of illegality is subjected to be challenged to the higher authority by way of revision and not by review as review deals with an apparent error on the record.

With regard to the absence of prejudice on part of the respondent if the application is granted, Mr. Luhigo refuted this argument contending that this case has been in court from 2016 and the respondent has been remaining in court's corridor and this has occasioned inconvenience on part of the respondent and costs in terms of money. He further argued that the delay in this case was caused by her negligence, she having had legal service, she had to realise immediately that the judgment was defective. Counsel for the respondent was of the opinion that the applicant

has demonstrated negligence which is an insufficient ground to grant extension. Counsel relied on the case of **Modestus Daud Kangalawe as Administrator of the estate of Daud Tamaunge Kangalawe v. Dominicus Utenga,** CAT at Iringa

In a short rejoinder, Counsel for the applicant maintained that the applicant did not sleep on her rights as she was in court throughout and that it is only the court which is responsible for executing its order and the applicant has stated where she was.

He insisted that there was technical delay in the sense that if the decision of the court was executable no problem would have arisen. He was emphatic that a person declared as a winner is not expected to remain with an empty judgment and that the applicant cannot be blamed for this misfortune she did not occasion.

Having considered the rival submissions of learned Advocates of both sides and having perused the applicant's affidavit, I have the following to observe.

This application has been preferred under, *inter alia,* rule 56 (1) of the Labour Court Rules, GN No. 106 of 2007 which stipulates that:-

"The court may extend or abridge any period prescribed by these rules on application and on good cause shown, unless the court is precluded from doing so by written law".

The question calling for determination, therefore, is whether the grounds adduced by the applicant in her affidavit and amplified in the submissions in support of the application constitute good cause for extension of time to file an application for review out of time.

It has been amply demonstrated by the applicant both in the affidavit and the submissions of her learned Counsel and not disputed by the respondent that the decision of this court in Revision Application No. 60 of 2016 was given in the applicant's favour. Not disputed also is the fact that despite the decision being given in her favour, the applicant has failed to realise her rights awarded to her by this court because the Award is incapable of being executed.

The record is clear that the impugned ruling of this court was handed down on 5th day of November, 2018. It is undisputed argument by the applicant that after the delivery of the ruling, she embarked on having the Award executed. It is not disputed that this court found the Award incapable of being executed on the ground that the Commission for Mediation and Arbitration had not given any order in favour of the applicant and the High Court did not give any order capable of being

executed as this court simply allowed the appeal (sic) without specifying which should be executed. Clearly, the applicant was not responsible for this misfortune. This order was handed down on the 2nd day of December, 2021. On 3rd day of December, 2021, the applicant filed this application.

In that respect, the applicant has sufficiently explained the cause of the delay and pursuing the execution of the Award given by a court of law amounted to a good cause for the delay. The argument by Counsel for the respondent that the delay was inordinate has not basis. Besides, this application has been filed promptly and swiftly.

I am satisfied that the applicant has demonstrated that cause for the delay in filing a memorandum of review was just and adequate as she was diligently, prosecuting her application for execution of the Award which, unfortunately, turned out to be incapable of being executed.

Besides, since the applicant was engaged in the court seeking to execute her Award, the delay, if any, as rightly pointed out by Mr. Mujungu, amounted to a technical delay. It should be excluded in the computation.

On the argument by the Counsel for the respondent that illegality cannot be pursued by way of review but by revision to a higher court, the Court of Appeal in the case of **Chandrakant Joshubhai Patel v. R. [2004] T.L.R. 218,** propounded three grounds under which an

application for review can be considered that is, where the decision was obtained by fraud; or where a party was wrongly deprived of the opportunity to be heard and where there is a manifest error on the record, which must be obvious and self-evident, and which resulted in a miscarriage of justice. Further, the same Court, in the case of **Mehar Singh t/a Thaker Singh v. Highland Estate and 2 others,** Civil Reference No. 2 of 2014 made the following pertinent observation:-

> 'In review, the aim is to have a second look at the Court's own judgment with a view to correct a manifest mistake apparent on the face of the record and, where appropriate, to defuse a resulting miscarriage of justice.

In the impugned ruling, the extracted order cum Award runs as follows: **'This application is accordingly allowed. Each part bear own costs. It is so ordered'.**

In view of the fact the Commission for Mediation and Arbitration did not give any order in favour of the applicant and the High Court simply allowed the application without specifying what rights of the applicant were hence leading to making the applicant carry an empty Award, it is my firm but considered finding that this court has power to have a second look at its own ruling with a view to correct a manifest mistake apparent

on the face of the record and, where appropriate, to defuse a resulting miscarriage of justice.

It is also my finding that if this application is granted and time extended, the court in the review, may have the opportunity to clarify the order or make a specific order that shows how it must be complied with and enforced hence defusing a resulting miscarriage of justice.

For the reasons stated, I grant this application and extend time to the applicant to file a memorandum of review. The memorandum of review to be filed within fifteen (15) days from the date of this ruling.

No order as to costs is made.

W.P. Dyansobera
Judge
19.5.2022

This ruling is delivered at Mwanza under my hand and the seal of this Court on this 19th day of May, 2022 in the presence of the applicant in person and Mr. Mwalimu Walii, representing the respondent.

W.P. Dyansobera
Judge